Nos. 95-259 & 95-779

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DARLENE WALTERS AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioners,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD D. BIEBER,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE ILLINOIS STATE CHAMBER OF COMMERCE; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; ILLINOIS MANUFACTURERS' ASSOCIATION; ILLINOIS RESTAURANT ASSOCIATION; ILLINOIS RETAIL MERCHANTS ASSOCIATION; THE MANAGEMENT ASSOCIATION OF ILLINOIS; AND WISCONSIN MANUFACTURERS & COMMERCE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are one national federation and several state associations which include among their membership more than 240,000 employers.[2] More than half the employers represented by *amici curiae* are businesses small enough to be affected by the Court's decision in this case. In the view of *amici*, the decision below properly limits the scope of federal antidiscrimination law by excluding from coverage businesses too small to bear the burden of federal enforcement, while allowing state and local enforcement agencies the opportunity to work with small businesses to eliminate invidious discrimination from the workplace.

SUMMARY OF ARGUMENT

I.

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* (1994), excludes small businesses from its coverage unless they "[*have*] fifteen or more employees *for each working day* in each of twenty or more calendar weeks." 42 U.S.C. § 2000e(b) (1994) (emphasis added). The congressional proponents and opponents of Title VII agreed that some limitation was necessary to address the following concerns: (1) small businesses would be unable to afford the cost of documenting and defending the propriety of their employment decisions; (2) federal regulation would intrude too greatly into the close relationship between employer and employees in

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[2] Attached in the Appendix to this brief are statements of interest of each of the *amici*.

the typical small business; and (3) coverage of all employers, regardless of size, would overburden the Equal Employment Opportunity Commission ("EEOC"), which enforces Title VII, with more claims than it could handle. Congress also recognized that it was limiting only the power of the *federal government* to remedy workplace discrimination – it left the states free (indeed it encouraged them) to protect employees in small workplaces excluded from Title VII's coverage.

Congress's concerns for the burden to be placed on small businesses and for the appropriate apportionment of federal and state enforcement authority – not the "remedial" or "humanitarian" purposes behind Title VII's substantive provisions – provide the context for the Court's inquiry here. The mere fact that Title VII is "remedial legislation" does not compel this Court to adopt any arguably plausible reading of the statute that will result in the broadest possible coverage. To the contrary, when, as here, the Court is called upon to construe a statutory provision designed to *exclude* a certain class of employers from coverage, principles of "liberal construction" do not apply. The expansive interpretation of the operative language urged by petitioners would subject hundreds of thousands of small businesses to federal regulation from which they otherwise would be excluded under the reading given the definition of employer by the court of appeals. This Court need not adopt a broad construction of the employer definition to protect employees of small businesses from invidious discrimination – most states (as Congress anticipated) already have done so.

II.

Petitioners (and two courts of appeal) say an employee should be counted for each working day in any calendar week during which the employee appears "on the payroll" (*i.e.*, is entitled to some pay) *for that week*.[3] Respondents (and two other courts of appeal, including the court below) say an employee should be counted for each working day in a given calendar week for which the employee appears "on the payroll" (*i.e.*, is paid) *for that day*.[4] Only the latter interpretation gives full meaning to the phrase "for each working day." If Congress had intended that petitioners' method be used, it could have omitted this phrase and said "who has fifteen or more employees in each of twenty or more calendar weeks." The court of appeals was correct in refusing to read the statute as if it had been written this way because, as this Court has held, a statute must be construed in a way that avoids rendering words or phrases superfluous. *See Lane v. Pena*, 64 U.S.L.W. 4541, 4545 (U.S. June 18, 1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

III.

The legislative history of Title VII reveals why Congress sought to limit the statute's coverage, but it is silent as to why Congress included the phrase "for each working day" in the definition of employer. Earlier versions of

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[3] Petitioners refer to this as the "payroll method" of counting employees, by which they mean the "weekly payroll" method.

[4] Petitioners refer to this as the "day-by-day" method, but "daily payroll" is a better description.

the bill that became Title VII limited coverage to employers of twenty-five or more employees, but did not include any of the statutory language at issue here. That language was added to the statute because of a concern that as originally written, the statute could be construed to cover employers who had twenty-five or more employees during *any* week in a given calendar year. There was a particular concern about seasonal employers, who would have the requisite number of employees for only a few weeks per year. That explains why Congress added language requiring employers to have twenty-five or more employees "for twenty or more calendar weeks," but it sheds no light on why the phrase "for each working day" also was added to the statute.

Petitioners attempt to divine the statutory meaning from (1) a 1955 Internal Revenue Service ("IRS") ruling interpreting the Unemployment Compensation Act, 26 U.S.C. § 3306(a) (1958), and (2) congressional committee reports interpreting the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* (1994), which was passed in 1993. None of these sources sheds any light on what Congress thought in 1964 about the question before the Court (if Congress considered the question at all). While the author of Title VII's definition of employer based that definition on language taken from the Unemployment Compensation Act, the definition in that act is quite different from the one at issue here. So there is nothing to be learned from the IRS's opinion as to the meaning of the earlier statute. Nor does one senator's reference to the origin of the Title VII language imply that Congress was aware of, let alone relying on, the IRS ruling.

The Senate and House Reports on the FMLA – issued some thirty years after passage of Title VII – provide no

guidance as to Congress's intent in 1964. "[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).

IV.

The EEOC's opinion as to the limits of its own authority is entitled to no deference here. Federal agencies are presumed to have special expertise as to subjects within their enforcement power, but they are not empowered to interpret congressional intent as to the scope of their own authority. Such questions fall within the province of the judiciary.

For all the foregoing reasons, the court of appeals should be affirmed.

ARGUMENT

I.

THE RELEVANT CONGRESSIONAL INTENTION HERE IS THE DESIRE OF CONGRESS TO AVOID PLACING ON CERTAIN SMALL BUSINESSES THE BURDEN OF ELIMINATING INVIDIOUS DISCRIMINATION FROM THE AMERICAN WORKPLACE WHILE ALLOWING THE STATES TO IMPOSE SUCH A BURDEN (AS MOST HAVE)

A. The Purposes Behind Limiting Coverage To Exclude Small Businesses

The statutory language at issue here is language of limitation and exclusion. When Congress decided to have the federal government join the fight against invidious discrimination in the American workplace, it could have extended the coverage of Title VII to every employer in

all industries affecting commerce. But Congress did not do so because it recognized that federal coverage would bring with it burdens that certain small employers should not have to bear. The broad reading petitioners would give to Title VII's definition of "employer" would undermine that congressional intention by including in Title VII's coverage many employers Congress sought to exclude.

While there was considerable debate as to where the line should be drawn, the proponents and opponents of Title VII agreed that the potential damage Title VII would bring to small businesses outweighed the benefits of eliminating discrimination from such workplaces. The limitation enacted by Congress was designed to address the following concerns: (1) small businesses would be unable to afford the cost of documenting and defending the propriety of their employment decisions;[5] (2) federal regulation would intrude too greatly into the close relationship between employer and employees in the typical small business;[6] and (3) some limitation was necessary to avoid overburdening the EEOC with more claims than it could handle.[7] Congress also recognized that it was limiting only the power of the *federal government* to remedy workplace discrimination – it left the states free (indeed it encouraged them) to protect employees in small workplaces excluded by Title VII.[8] This Court's review of the

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[5] *See, e.g.*, 110 Cong. Rec. 2708, 2711, 9594, 13088, 13092 (1964).

[6] *See, e.g.*, 110 Cong. Rec. 9601, 13085-86, 13088 (1964).

[7] *See, e.g.*, 110 Cong. Rec. 13085, 13089 (1964).

[8] *See, e.g.*, 110 Cong. Rec. 2709-10, 2712, 2714, 7214, 7216, 8193, 11936, 12688, 12708, 12724-25, 13087-90, 14313, 15882 (1964).

statutory language should be focused by these congressional desires to avoid overburdening small businesses and to apportion appropriately between federal and state governments the responsibility for remedying workplace discrimination.[9]

B. "Liberal Construction" Of The Language In Question Would Undermine The Congressional Purpose

Petitioners would have this Court focus on the "remedial" or "humanitarian" purposes of Title VII's substantive provisions, rather than on the purposes behind its limitation on coverage. It is appropriate to adopt a "liberal construction" of a remedial statute when a narrower view would take away the remedy the statute was designed to provide. Thus, for example, in *Gomez v. Toledo*, 446 U.S. 635 (1980), this Court "construed generously" pleading requirements under 42 U.S.C. § 1983 because to do otherwise would deny civil rights plaintiffs the damages remedy Congress sought to give them. *Id.* at 639. But the mere fact that Title VII is remedial legislation does not compel this Court to adopt any arguably plausible reading of the statute that will result in the broadest possible coverage. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990).

To the contrary, when, as here, the Court is called upon to construe a statutory provision designed to

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[9] When Congress reduced the coverage threshold from twenty-five to the current fifteen employees in 1972, the debate addressed the same concerns about overburdening smaller businesses and the EEOC. *See, e.g.*, 118 Cong. Rec. 671, 1513, 1526, 1841-43, 1845-46, 1975-77, 2386-91, 2393, 2409-11, 2490-91, 3132, 3135-36, 3171-72, 4907, 7567 (1972).

exclude a certain class of employers from coverage, principles of "liberal construction" do not apply and "the language can[not] be read for maximum inclusion." *Richardson v. Bedford Place Housing Phase I Associates*, 855 F. Supp. 366, 371 (N.D. Ga. 1994); *see Calderon v. Witvoet*, 999 F.2d 1101, 1104 (7th Cir. 1993) (expansive interpretation of exemption from labor standards statute would "utterly defeat [its] function"); *see also Flores v. Rios*, 36 F.3d 507, 510 (6th Cir. 1994) (when Congress has chosen to exclude a class of employers from regulatory scope of labor standards statute, court must avoid interpretation which would "eviscerate" exemption).

Contrary to petitioners' implicit assumption, the issue here is not whether to allow small businesses to discriminate, but whether to impose upon them the financial burden of supporting the federal scheme for eliminating such discrimination. In most cases of alleged discrimination filed with the EEOC in which the agency makes some determination,[10] the employer is found *not* to have violated the law.[11] Defense of meritless charges is a

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[10] A significant percentage of cases never get that far, having been closed because of EEOC failure to locate the charging party; refusal of the charging party to respond, cooperate, or accept full relief; withdrawal by the charging party; lack of EEOC jurisdiction; and other nonsubstantive reasons. Such administrative closures accounted for approximately 28.3% of EEOC total resolutions in fiscal year 1993 (20,285 out of 71,716 resolutions) and 36.4% in fiscal year 1994 (26,012 out of 71,563). *EEOC Fiscal Year 1994 Annual Report* at 11.

[11] In fiscal year 1993, "no cause" resolutions accounted for 56% of the EEOC's total resolutions and significantly outnumbered EEOC merit resolutions, which represented only 15.7% (40,183 "no cause" compared to 11,248 merit resolutions). In fiscal year 1994, "no cause" resolutions were 48.1% of total resolutions and again outnumbered merit resolutions, which accounted for 15.5%, by a wide margin (34,451 "no cause" compared to 11,100 merit resolutions). *EEOC Fiscal Year 1994 Annual Report* at 11.

burden the business community appropriately must pay to support the goal of eradicating invidious discrimination in the American workplace.[12] But it is a burden which Congress decided small employers should not have to share. By spreading the cost too broadly, petitioners' interpretation would undermine Congress's intent.

An overly broad view of coverage also threatens to intrude upon the associational interests of small employers whose freedom of association Congress sought to preserve. Here again, the issue is not whether these small businesses should be allowed to discriminate. The issue is whether employment relationships in such a small workplace should be subjected to the scrutiny of a federal agency (and potentially a federal court). Given the "intimate, personal character"[13] of most small businesses, Congress thought the owner of such a business should be allowed to hire as employees and appoint as

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[12] As one court noted, the burden can be substantial:

> Today, many Title VII cases that this court considers do not survive the pleading stage and result in a judgment in favor of the defendant. Nonetheless, the cost of success on a motion to dismiss or motion for summary judgment runs into the tens of thousands of dollars. For small economic enterprises, such outlays threaten financial viability.

Richardson, 855 F. Supp. at 371. One need only look at this case to see the potentially ruinous cost of having to litigate even one promotion decision. Metropolitan's apparent ability to afford this litigation is the exception rather than the rule among the businesses to which petitioners would extend coverage.

[13] 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey).

managers persons with whom he or she was most comfortable – even if the owner's selection methods resulted in a less diverse workforce than the ideal. If this Court accepts petitioners' overinclusive definition of "employer," tens of thousands more decisions like these will be subject to the sort of judicial second-guessing from which Congress sought to spare smaller businesses.[14]

Petitioners' statutory construction arguments also ignore Congress's desire to limit the EEOC's caseload to manageable levels and to share enforcement responsibility with the states.[15] The EEOC's backlog of pending cases already has grown to a level which significantly impairs its ability to enforce the federal antidiscrimination statutes.[16] One can imagine the effect of adding several hundred thousand more employers and several million more employees[17] to the classes covered by Title

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[14] The EEOC here found no reasonable cause to believe that respondents discriminated against petitioner Darlene Walters ("Walters") because of her gender. Yet under the federal enforcement scheme, she was still entitled to bring this claim to a federal district court.

[15] *See, e.g.*, 110 Cong. Rec. 13085, 13089 (1964).

[16] As of fiscal year 1994, the EEOC's backlog of cases stood at 97,000, after a year in which a record-breaking number of charges were received. *EEOC Fiscal Year 1994 Annual Report* at 31. The EEOC's own annual report complains repeatedly about insufficient staffing in the face of the flood of charges it has received in recent years. *Id.* at 3, 12.

This case is a good example of the effect the backlog can have. The EEOC filed its complaint in the district court *three years* after petitioner Walters's employment was terminated (allegedly in retaliation for filing a charge with the EEOC).

[17] According to the statistics relied upon by petitioners' *amici*, nearly 800,000 employers, employing more than 10

VII, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (1994), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1994).[18] If this Court affirms the court of appeals, and Congress is unhappy with that decision, it can change the statutory definition and (presumably) give the EEOC sufficient resources to handle the resulting increase in its caseload. But the potentially devastating impact of such an increase on the EEOC's already overburdened operation argues against a broad construction of the statute by this Court.

C. The States Can (And Most Do) Fill Any Gaps In Coverage

Petitioners predict that affirmance here will leave millions of workers without protection from invidious discrimination. But this Court need not adopt a broad construction of the employer definition to protect these employees – most states (as Congress anticipated) already have done so. Thirty-five states, the District of Columbia, Puerto Rico and the Virgin Islands have enacted laws similar to Title VII covering employers with *fewer* than fifteen employees.[19] Twelve states have a fifteen-

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million persons, report that they have ten to nineteen employees. Bureau of the Census, Dep't of Comm., *County Business Patterns 1993*, fig. 1 (1995).

[18] The ADA and ADEA definitions of employer contain language identical to that the Court will construe in this case. *See* 42 U.S.C. § 12111(5)(A) (1994); 29 U.S.C. § 630(b) (1994).

[19] *See* Alaska Stat. § 18.80.300 (Supp. Oct. 1995) (one employee); Ark. Code Ann. § 16-123-102(5) (Michie Supp. 1995) (nine employees); Cal. Gov't Code § 12926(d) (West Supp. 1996) (five employees); Colo. Rev. Stat. § 24-34-401 (1988) (one employee); Conn. Gen. Stat. Ann. § 46a-51(10) (West 1995) (three

employee threshold,[20] but three of these have omitted the phrase "for each working day" from their definitions of

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employees); Del. Code Ann. tit. 19 § 710(2) (1995) (four employees); D.C. Code Ann. § 1-2502 (1981) (one employee); Haw. Rev. Stat. § 378-1 (1994) (one employee); Idaho Code § 67-5902 (1995) (five employees); Ind. Code Ann. § 22-9-1-3 (West Supp. 1996) (six employees); Iowa Code Ann. § 216.2(7) (West 1994) (one employee); Kan. Stat. Ann. § 44-1002(b) (1993) (four employees); Ky. Rev. Stat. Ann. § 344.030 (Michie/Bobbs-Merrill Supp. 1994) (eight employees); Me. Rev. Stat. Ann. tit. 5 § 4553(4) (West Supp. 1995) (one employee); Mass. Gen. L. Ann. ch. 1518 § 1(5) (West 1996) (six employees); Mich. Comp. Laws Ann. § 37.2201(a) (West 1985) (one employee); Minn. Stat. Ann. § 363.01(17) (West 1991) (one employee); Mo. Rev. Stat. § 213.010 (Vernon Supp. 1996) (six employees); Mont. Code Ann. § 49-2-101(8) (1995) (one employee); N.H. Rev. Stat. § 354-A:2(7) (1995) (six employees); N.J. Stat. Ann. § 10:5-5(e) (West Supp. 1996) (one employee); N.M. Stat. Ann. § 28-1-2(B) (Michie Supp. 1995) (four employees); N.Y. Exec. Law § 15-292(5) (Consol. 1995) (four employees); N.D. Cent. Code § 14-02.4-02(5) (1991 & Supp. 1995) (one employee); Ohio Rev. Code Ann. § 4112.01(2) (Baldwin 1994) (four employees); Or. Rev. Stat. § 659.010(6) (Supp. 1994) (one employee); Pa. Cons. Stat. § 954 (Supp. 1996) (four employees); P.R. Laws Ann. tit. 29 § 146 (1995) (one employee); R.I. Gen. Laws § 28-5-6 (1995) (four employees); S.D. Codified Laws Ann. § 20-13-1(7) (1995) (one employee); Tenn. Code Ann. § 4-21-102(4) (Supp. 1995) (eight employees); Vt. Stat. Ann. tit. 21 § 494(1) (1987) (one employee); V.I. Code Ann. tit. 24 § 421(2) (1993) (one employee); Va. Code Ann. § 2.1-715 (Michie 1995) (one employee); Wash. Rev. Code Ann. § 49.60.040 (West Supp. 1996) (eight employees); W. Va. Code § 5-11-3(d) (Supp. 1996) (twelve employees); Wis. Stat. Ann. § 111.32(6) (West 1988) (one employee); Wyo. Stat. § 27-9-102(b) (June 1991) (two employees).

[20] *See* Ariz. Rev. Stat. Ann. § 41-1461 (Supp. 1995); Fla. Stat. Ann. § 760.02(7) (West 1986 and Supp. 1995); Ill. Comp. Stat. Ann. ch. 775 para. 5/2-101(B)(1)(a) (1993); La. Rev. Stat. Ann. § 23:1006(A) (West 1985); Md. Ann. Code art. 49B § 15(b) (1994); Neb. Rev. Stat. § 48-1102(2) (1993); Nev. Rev. Stat. Ann. § 613.310

"employer."[21] Only three states have no statute prohibiting discrimination by private employers based on the characteristics protected under Title VII.[22]

When it enacted Title VII, Congress not only allowed for concurrent jurisdiction with the states, but it also *required* that the states have the initial opportunity to process a discrimination charge if they chose to do so.[23]

(Michie 1996); N.C. Gen. Stat. § 143-422.2 (1993); Okla. Stat. Ann. tit. 25 § 1301(1) (West Supp. 1996); S.C. Code Ann. § 1-13-30(e) (Law. Co-op 1986); Tex. Lab. Code Ann. § 21-002(8)(A) (West 1996); Utah Code Ann. § 34-35-2(7) (1994).

[21] *See* Ill. Comp. Stat. Ann. ch. 775 para. 5/2-101(B)(1)(a) (1993); La. Rev. Stat. Ann. § 23:1006(A) (West 1985); N.C. Gen. Stat. § 143-422.2 (1993).

[22] The states are Alabama, Georgia, and Mississippi. Georgia and Mississippi prohibit discrimination by public employers based on the characteristics protected under Title VII. *See* Ga. Code Ann. 45-19-21 (1990 & Supp. 1996); Miss. Code. Ann. § 25-9-149 (1991). Alabama has prohibited discrimination by public employers based on race or sex in a general appropriations act. 191 Ala. Acts 859.

[23] Under Title VII, a charge may not be deemed filed with the EEOC unless and until (1) the complainant files his charge with an appropriate agency in the state in which the discrimination allegedly took place and (2) either sixty days pass or that agency earlier terminates its proceedings. 42 U.S.C. § 2000e-5(c) (1994); *see EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 110-11 (1988); *Mohasco Corp. v. Silver*, 447 U.S. 807, 817 (1980); *see also Oscar Mayer Co. v. Evans*, 441 U.S. 750, 756 (1979). "Resort to appropriate state proceedings is mandatory, not optional." *Oscar Mayer*, 441 U.S. at 756 n.3. This deferral requirement "is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Oscar Mayer*, 441 U.S. at 755; *see Commercial Office Products*, 486 U.S. at 110-11; *Mohasco*, 447 U.S. at 821.

Affirmance of the court of appeals may mean that some employees will have to turn to state and local fair employment agencies for relief, but that is exactly what Congress anticipated would happen in a dual enforcement scheme. Proponents of Title VII emphasized that state enforcement agencies would have "primary, exclusive jurisdiction . . . for a sufficient period of time to let them work out their own problems at the local level." 110 Cong. Rec. 13087 (1964) (remarks of Sen. Dirksen). Senator Humphrey, a principal sponsor of Title VII, pointed out that the statute "encourage[d] the States and the local communities to take a greater share of the responsibility in carrying out the equal protection of the laws and equal rights within the laws." 110 Cong. Rec. 11936 (1964). One representative noted that in states with effective anti-discrimination laws, "there will be no cause for the Federal Government to intrude in these areas at all." 110 Cong. Rec. 2710 (1964) (quoted statement of Rep. McCulloch). Senator Saltonstall urged his colleagues to support the Dirksen-Mansfield substitute which became Title VII because it "provide[d] greater opportunity for fair employment problems to be settled locally. This is very important in the 30 States which already have fair employment laws and which settle their problems locally, in one way or another." 110 Cong. Rec. 13089 (1964).

To the extent a narrower interpretation of Title VII coverage results in greater reliance on state enforcement, it also serves the congressional purpose of reducing the regulatory burden on small employers. Since the EEOC only can investigate and conciliate claims, but not adjudicate them, Title VII enforcement actually occurs in federal courts, with all the attendant financial burdens of federal

litigation.[24] The proponents of Title VII presumed that deferral to state enforcement would "promote 'time economy and the expeditious handling of cases.' " *Commercial Office Products*, 486 U.S. at 118 (quoting remarks of Sen. Dirksen at 110 Cong. Rec. 9790 (1964)); *see id.* at 119 n.4 ("deferral provisions will 'assure individual complainants that they will have fair and expeditious consideration of their grievances' ") (quoting remarks of Sen. Dirksen at 110 Cong. Rec. 8193 (1964)); *see also* 110 Cong. Rec. 13087 (1964) (remarks of Sen. Dirksen); *id.* at 13089 (remarks of Sen. Saltonstall).

D. Petitioners' Statistical Analysis Of The 1990s Workplace Sheds No Light On Congress's Intent In 1964

Petitioners say the Seventh Circuit's method of counting employees will exclude many small businesses that hire "part-time employees" (by which they mean employees who work fewer than all the "working days" in each calendar week). Relying on recent statistics, they say that minority and female employees make up a disproportionate number of the part-time workforce and that the Seventh Circuit's decision will exclude these individuals from federal antidiscrimination protection.[25] But Congress knew when it limited coverage that some minority and female employees would be excluded from federal protection. Petitioners' analysis shows how large

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[24] Indeed, a complainant may request the right to sue before the EEOC even has completed its investigation. *See* 42 U.S.C. § 2000e-5(e)(1) (1994); 29 C.F.R. § 1601.28(a)(1),(2) (1995); *see also Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1061-63 (11th Cir. 1994).

[25] The statute Congress passed, of course, protects equally employees of all races and both genders. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-80 (1976).

the number may be in 1996, but it has nothing to do with what Congress intended in 1964. The appropriate inquiry here is what interpretation best serves the congressional purposes of limiting the burden on small businesses and on the federal enforcement scheme, not on what classes of employees Congress intended to protect.[26]

Petitioners' statistics regarding flex-time scheduling in the 1990s also provide no guidance to congressional intent in 1964. Besides being irrelevant, petitioners' statistics overestimate the impact of such scheduling on coverage of small businesses. While many employers today do offer flexible scheduling, this often means that employees are allowed to leave earlier or come in later, not that they are working "compressed work weeks." Some employers have adjusted their production schedules to allow employees to complete in four days of longer hours what they used to do in five days of shorter hours. But there is no reason to believe that this practice is widespread in the *smaller workplaces at issue in this case*.[27] Compressed

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[26] If petitioners are correct when they say smaller businesses are hiring a disproportionate number of minority and female employees, then these businesses may be less in need of federal regulation than petitioners believe. An employer who hires someone with a protected characteristic is less likely to take adverse action against that person based on the same characteristic. *See Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994); *LeBlanc v. Great American Insurance Co.*, 6 F.3d 836, 847 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174-75 (8th Cir. 1992); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

[27] Indeed, the statistics offered by *Amici* Women's Legal Defense Fund *et al.* are based in part on a private study of "major U.S. employers." Brief of the Women's Legal Defense Fund *et al.* as *Amici Curiae*, p. 8 n.11. Petitioner Walters says respondent Metropolitan Educational Enterprises, Inc.

work weeks are much more common in large workplaces, where employers have enough workers to adopt more flexible scheduling. With fewer employees to go around, smaller businesses generally cannot do that. Nor does a "compressed work week" necessarily result in loss of coverage under Title VII. An employer with fifteen employees working ten hours a day for four "working days" is covered by Title VII just like an employer with fifteen employees working five days at eight hours.

E. There Is No Reason To Believe Small Businesses Will Manipulate Scheduling To Avoid Coverage

Petitioners also speculate that the court of appeals' decision will cause a parade of cases in which small businesses manipulate their scheduling to avoid Title VII coverage. But as the Seventh Circuit noted, "In more than a decade since this court ruled in *Zimmerman*, this parade has had conspicuously few participants." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1230 (7th Cir. 1995). Indeed, none of the reported cases involved alleged manipulation.

Nor is there any reason to believe that such manipulation occurs in small businesses. First of all, few small employers are likely even to be aware of the counting issue raised by this case. Secondly, the owner of a small business will be much more concerned about having enough employees around to produce products and serve customers than with the effect of scheduling on Title VII coverage. Finally, in most states, the small employer still will be subject to state antidiscrimination laws no matter

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("Metropolitan") engaged in flexible scheduling, but Metropolitan, a company operating nationwide, is not the typical small business.

how work schedules are manipulated, so there is little incentive for such manipulation. In fact, petitioners' counting method may be more likely to have an adverse effect on the classes of workers about which petitioners are concerned. If all part-time employees count for the entire week, regardless of which days they work, small businesses may be less likely to hire the student, retiree, or homemaker who is able to work only on certain days.

F. The Seventh Circuit's Counting Method Generally Will Be Simple To Apply

According to petitioners, their method of counting is easier than the Seventh Circuit's, as if this somehow makes a difference. There is no evidence Congress was looking for simplicity here, and history tells us that Congress is not adverse to making calculations complex. (*See, e.g.*, substantial portions of the Internal Revenue Code.) Petitioners also overestimate the complexity of the method of counting adopted by the Seventh Circuit[28] and underestimate the burdens of the "payroll method." The Seventh Circuit's method of counting requires that one look at the "payroll" (*i.e.*, who is being paid) for each working day in each calendar week. The method favored

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[28] There is no reason to believe that the amount of time spent by the parties' lawyers here is typical. If time and payroll records are kept in an orderly fashion, the task of preparing a daily headcount should be "an extremely simple task, as evidenced by the dearth of cases in which this issue is dispositive." *Goudeau v. Dental Health Services, Inc.*, 901 F. Supp. 1139, 1144 (M.D. La. 1995). "It is more likely that since only small employers will contend that they are not covered by Title VII, the amount of documents which would reflect the employees at work on any given day – such as time cards and work schedules – is unlikely to be substantial." *Id.*

by petitioners requires that one look at the "payroll" for the entire *calendar* week. But most employers pay their employees on a biweekly or semimonthly basis, and those employers with weekly pay periods often designate a workweek different from the calendar week. So *under either method*, one must look at some record to determine an hourly employee's status on each working day of a given calendar week.

Petitioners say their method requires that one look only at records required by federal and state law, but that is equally true of the method approved below. Contrary to petitioners' assertion, federal and most state laws require that employers keep for hourly employees[29] a record of "hours worked each workday." 29 C.F.R. § 516.2(a)(7) (1995).[30] Employers routinely keep such records. Rare is the workplace in which hourly workers do not have either a time clock or a sign-in sheet. Indeed, without such records, employers would be unable to fulfill their obligations under the Fair Labor Standards Act and corresponding state statutes to pay hourly employees a premium rate for hours worked in excess of forty per workweek. *See* 29 U.S.C. § 207 (1994); *see also, e.g.*, Ill. Comp. Stat. Ann. ch. 820 para. 105/4a (1993 & Supp. 1996).

An example of a common pay arrangement illustrates the situation under both counting methods. Assume a pay period beginning on the first of the month and ending on the fifteenth. Such a pay period in all cases includes all or part of *three calendar weeks*. Since the

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[29] Salaried employees count for all working days in each calendar week under either method.

[30] Most states have similar requirements. *See, e.g.*, Ill. Comp. Stat. Ann. ch. 820 para. 105/8 (1993).

payroll record for the pay period will show only total hours worked, it will be necessary to examine daily time records *under either method* to determine who was on the payroll for each working day of all three calendar weeks. So in most instances, the task of determining coverage under either method will impose a similar burden. There is no merit to petitioners' argument that their method is so much simpler that Congress must have had it in mind when it passed the relevant language.

II.

THE DAILY PAYROLL METHOD AVOIDS RENDERING THE PHRASE "FOR EACH WORKING DAY" SUPERFLUOUS

An employer is subject to Title VII coverage if (during the relevant years) it "*has* fifteen or more employees *for each working day* in each of twenty or more calendar weeks." 42 U.S.C. § 2000e(b) (emphasis added). Given that several court of appeals panels have disagreed as to the meaning of the italicized language (with each implying that the language clearly supported its view), it is difficult to say that the language has a "plain meaning." But there is only one meaning that avoids rendering the phrase "for each working day" superfluous, and that is the meaning adopted by the Seventh Circuit.

Petitioners say an employee should be counted for each working day in any calendar week during which the employee appears "on the payroll" (*i.e.*, is entitled to some pay)[31] *for that week*. The court of appeals held that

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[31] A "payroll" is a "paymaster's or employer's list of those entitled to receive compensation at a given time and of the amounts due to each." Webster's Third New International Dictionary, 1659 (def. 1) (1981). Although it is not entirely clear

an employee should be counted for each working day in a given calendar week for which the employee appears "on the payroll" (*i.e.*, is paid) *for that day*. Only the latter interpretation gives full meaning to the phrase "for each working day." If Congress had intended that petitioners' method be used, it could have left this phrase out and said "who has fifteen or more employees in each of twenty or more calendar weeks." The court of appeals was correct in refusing to read the statute as if it had been written this way because, as it had held some thirteen years earlier, a court "should not construe a statute in a way that makes words or phrases meaningless, redundant or superfluous." *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353 (7th Cir. 1983); *see Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect"); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' ") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)); *see also Lane v. Pena*, 64 U.S.L.W. 4541, 4545 (U.S. June 18, 1996) (refusing to adopt construction which would render statutory language "entirely superfluous").

Petitioners focus on the word "has," contending that it implies coverage whenever the employee has a continuing employment relationship with the employer

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from the decisions of the First and Fifth Circuits or from petitioners' briefs, the "payroll method" they support presumably would not include in any given calendar week an employee off for the entire calendar week on an *unpaid* leave of absence.

throughout a given calendar week. But that reading does not explain why the phrase "for each working day" is included in the statute. "[A] word is known by the company it keeps." *Gustafson*, 115 S. Ct. at 1069. If Congress was focusing on the existence of an employment relationship during a given week, it would not have followed the word "has" with the phrase "for each working day." Petitioners' reliance on the continuing nature of an employment relationship in other contexts or under other statutes ignores the purpose of the statutory language here – to measure the size of employers and exclude those too small to bear the burden of federal coverage. A part-time employee may have an "employment relationship" on each day of a given calendar week for purposes of determining seniority or health insurance coverage, but that does not mean the employee counts under a statutory measure of coverage which focuses on "each working day."

Petitioners concede that an employee who enters or departs employment in midweek does not count for that week under their method.[32] They say this gives meaning to the phrase "for each working day," which it does – the same meaning respondents give the phrase (*i.e.*, that an employee does not count for a given day unless he or she is entitled to pay for the day). There is nothing in the text of the statute or its legislative history to support petitioners' restrictive view of the purpose of the operative language. According to petitioners, a part-time employee who works on Monday and Tuesday but then quits does

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[32] Under the Seventh Circuit's method, the employee *would* count for each day on which he or she works, thus *increasing* the likelihood of coverage that week, especially if the employee is replaced immediately.

not count for the balance of the week. According to respondents, an employee who works on Monday and Tuesday and is not scheduled for the rest of the week does not count for the balance of the week. Given that Congress's intent was to measure the size of the employer's *business* (not the size of its total *workforce*), there is no principled reason to conclude that Congress intended one result in the former case and a different result in the latter.

A test which focuses on employment relationships also is overinclusive. If every part-time employee counts for the entire week, Title VII will be extended to hundreds of thousands of small businesses of the type Congress meant to exclude. The number of employees it takes to accomplish the employer's daily business on its working days is a truer measure of the employer's size (the question the statutory language was designed to answer) than is the total number of employees on the weekly payroll. A business which needs twelve employees to accomplish its goals on each working day is a twelve-employee business, even if it staffs its workforce with ten full-time and five part-time employees.

Petitioners suggest various scenarios in which the Seventh Circuit's counting method produces results they consider "absurd" or "bizarre." But either method under consideration here can have odd results. As the Seventh Circuit pointed out in *Zimmerman*, under petitioners' method, an hourly worker who works two hours each Monday would be counted as an employee for every day of the week. 704 F.2d at 354. Such overinclusiveness would defeat Congress's goal of limiting statutory coverage to those employers able to afford the burden of enforcement. If the Seventh Circuit's method excludes some employers who would have been included had

Congress written a different test, then it is up to Congress to amend the statute or the states to provide protection (as most have). The answer cannot be to force a construction of the statute which includes too many employers simply to insure coverage of a few that would otherwise be excluded, especially when that construction does not give full meaning to the statutory language.

III.

THE LEGISLATIVE HISTORY IS SILENT ON THE QUESTION BEFORE THE COURT

While the legislative history of Title VII reveals why Congress sought to limit the statute's coverage, it is silent as to why Congress included the phrase "for each working day" in the definition of employer. Petitioners nevertheless attempt to divine the statutory meaning from (1) a 1955 Internal Revenue Service ("IRS") ruling interpreting a statute with language different from that at issue here, and (2) congressional committee reports interpreting a statute passed in 1993. None of these sources sheds any light on what Congress thought in 1964 about the question before the Court (if Congress considered the question at all).

Earlier versions of the bill that became Title VII limited coverage to employers of twenty-five or more employees, but did not include any of the statutory language at issue here. *See* H.R. 7152, 88th Cong., 1st Sess. (1963). That language was added to the statute because of a concern that, as originally written, the statute could be construed to cover employers who had twenty-five or more employees during *any* week in a given calendar year. *See, e.g.*, 110 Cong. Rec. 6450 (1964). There was a particular concern about seasonal employers, who would have the requisite number of employees for only a few

weeks per year. *See, e.g., id.* at 2711, 6450, 7216-17, 13087-88. That explains why the Senate added language requiring employers to have twenty-five or more employees "for twenty or more calendar weeks." *Id.* at 13087-88. But it sheds no light on why the phrase "for each working day" also was added to the statute.

During debate, Senator Dirksen explained that the new version of the definition was based on language in the Unemployment Compensation Act. 110 Cong. Rec. 13087 (1964). But the language of the two statutes differed significantly. The Unemployment Compensation Act stated:

> [T]he term "employer" does not include any person unless *on each of some twenty days during the taxable year, each day being in a different calendar week,* the total number of individuals who are *employed by him in employment* for some portion of the day (whether or not at the same moment of time) was four or more.

26 U.S.C. § 3306(a) (1958) (emphasis added). Given this language, it is not surprising the IRS had ruled that part-time employees counted for each week of their employment, even if they did not work on certain days of the week. Rev. Rul. 55-19, 1955-1 C.B. 496, 497 (1955). The Act's definition required only that an employee be "employed . . . in employment" twenty days, each day being in a different calendar week. 26 U.S.C. § 3306(a) (1958) (emphasis added). That test is quite different from Title VII's requirement that an employer have the requisite number of employees *"for each working day"* during twenty or more calendar weeks.[33] So the IRS ruling interpreting different language sheds no light on the meaning

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[33] *See Richardson v. Bedford Place Housing Phase I Associates*, 855 F. Supp. 366, 369 (N.D. Ga. 1994) ("Had Congress intended

of the phrase "for each working day" in Title VII. Nor does Senator Dirksen's reference to the *origin* of the language imply that Congress was aware of, let alone relying on, the IRS ruling. *See* 110 Cong. Rec. 13087 (1964).

Petitioners also cite favorable comments about the "payroll method" made in the Senate and House Reports on the FMLA some thirty years after passage of the language in question here. As this Court has said, "[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).[34] " 'It is the intent of the Congress that enacted [the statute] . . . that controls.' " *Oscar Mayer*, 441 U.S. at 758 (quoting *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977)). Despite the fact that *Zimmerman* was decided some thirteen years ago, Congress has done nothing to amend Title VII to reflect disapproval of *Zimmerman*'s holding. When Congress disapproved of this Court's holdings in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), it took little time overruling those decisions in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 and 42 U.S.C. § 2000e-2(m)). That is the only way Congress can change the law – it cannot do so by suggesting a

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to base the definition of employer on the Unemployment Compensation Act, it would have used far more similar language.")

[34] *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980); *United States v. Clark*, 445 U.S. 23, 33 (1980); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

different interpretation in comments made about a statute thirty years after it was passed.

If this Court were inclined to review subsequent legislative history, it would find that Congress continued to express concern over the burdens of federal enforcement on small businesses when it amended Title VII to lower the employee threshold in 1972.[35] At that time, the legislative history also reflects a continuing concern about the appropriate apportionment of federal and state responsibility in this area and about the effect of expanded coverage on the EEOC's workload.[36]

In 1989, when it passed the ADA, Congress still was concerned about the burden placed on small businesses by federal regulation. *See, e.g.*, 135 Cong. Rec. S10737-50 (1989). That concern was reflected in questions about the ADA's definition of "employer" (the same definition at issue here):

> Mr. BOSCHWITZ. . . . We need to get an idea of what [the ADA's] impact will be on small business. . . .
>
> Let me first, ask when you talk about employment, does the 15 or less [sic] employees mean full time or part time employees?
>
> Mr. KENNEDY. . . . I believe it is full time employees, those who work more than 22 hours a week.

135 Cong. Rec. S10750 (1989). While Senator Kennedy's reference to "22 hours" was wrong, his understanding that only certain "full time employees" counted shows that Congress had not accepted the "payroll method" as

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[35] *See* 118 Cong. Rec. 671, 1526, 1841-43, 1845-46, 1975-77, 2387-91, 3132, 3135, 3171-72, 4907 (1972).

[36] *See, e.g.*, 118 Cong. Rec. 1513, 2386, 2409, 3133, 3136 (1972).

the proper interpretation of the language at issue here. *See* 135 Cong. Rec. S10752-53 (1989) (remarks of Sen. Harkin) (employees who work fewer than 20 hours do not count).

Petitioners also urge this Court to adopt the "payroll method" so that enforcement of Title VII will be consistent with that of the FMLA. But Congress apparently had no such concern. When it enacted the FMLA, it set the employee threshold much higher (fifty),[37] and it excluded many part-time employees[38] and all employees for the first twelve months of their employment,[39] exclusions not made in Title VII, the ADA, or the ADEA.

IV.

THE EEOC'S OPINION AS TO THE LIMITS OF ITS OWN AUTHORITY IS ENTITLED TO NO DEFERENCE

Relying on an EEOC "Policy Statement" issued in 1990 and an EEOC general counsel opinion issued in 1966, petitioners urge this Court to defer to the EEOC's judgment as to the proper counting method here. Federal agencies are presumed to have special expertise as to subjects within their enforcement power, and deference to that expertise often is warranted. But federal agencies are not empowered to interpret congressional intent as to the scope of their own authority.

The cases upon which petitioners rely do not support deference here. For example, in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), this Court was deferring to

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[37] 29 U.S.C. § 2611(4)(A)(i) (1994).

[38] In order to be eligible for FMLA leave, an employee must have worked 1,250 hours in the twelve months prior to the date on which leave commences. 29 U.S.C. § 2611(2)(A)(ii) (1994).

[39] 29 U.S.C. § 2611(2)(A)(i) (1994).

the EEOC's judgment as to when state proceedings on a charge of discrimination have been "terminated" under Title VII's deferral provision (42 U.S.C. § 2000e-5(e) (1994)). *Id.* at 114-16. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court was examining the Environmental Protection Agency's interpretation of substantive provisions of the Clean Air Act. These were matters within the particular expertise of these agencies, and deference to that expertise was appropriate. But questions about the scope of an agency's authority fall within the province of the judiciary. *See Missouri v. Andrews*, 787 F.2d 270, 286 (8th Cir. 1986) (citing *Harmon v. Brucker*, 355 U.S. 579, 582 (1958); *Social Security Board v. Nierotko*, 327 U.S. 358, 368 (1946)), *aff'd sub nom. ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1987). As the Eighth Circuit said in *Andrews*:

> The *Chevron* rule requires deference only where an agency reasonably construes the applicable statute on a matter which is within its jurisdiction to decide. The limits of an administrative agency's statutory authority remains [sic] an issue suitable for judicial resolution.

Andrews, 787 F.2d at 286. "[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983). As the court of appeals said, it would be particularly inappropriate to give any deference to the 1990 guideline, which was issued long after *Zimmerman* had rejected the EEOC's view. *Metropolitan*, 60 F.3d at 1230.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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The Illinois State Chamber of Commerce (the "Illinois Chamber") includes among its members more than 4,000 employers, who employ more than one million workers throughout the State of Illinois, and several hundred other organizations such as local chambers of commerce and trade and professional associations. Nearly one-third of the Illinois Chamber's employer members are small businesses that will be affected by the Court's decision in this case. The issue raised in this case is of great importance to the Illinois Chamber's smaller business members because of the disproportionate burden in time and costs such businesses would have to bear should the scope of Title VII be extended beyond the limit set by the Seventh Circuit.

The Chamber of Commerce of the United States of America (the "Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Over half of the Chamber's 215,000 members will be affected by the Court's decision in this case.

The Illinois Manufacturers' Association ("IMA") is the oldest and largest statewide manufacturing association in the United States. IMA provides information and advocacy on behalf of member companies in such areas

as industrial relations, federal and state regulation, insurance, public affairs, and environmental, judicial and economic issues as they relate to the Illinois business climate. IMA's 5,000 members employ more than 80% of the total Illinois manufacturing workforce. A significant percentage of IMA's member companies employ fewer than twenty-five persons and thus are small enough to be affected by the outcome here.

The Illinois Restaurant Association (the "Association") represents 2,500 employers at more than 7,000 establishments across the State of Illinois. The Association's mission is to promote and strengthen the restaurant industry; champion industry concerns and interests; provide leadership and education; and be of service to the community. Approximately 25% of the Association's members operate small establishments which will be affected by the Court's decision in this case.

The Illinois Retail Merchants Association ("IRMA") is an Illinois not-for-profit trade association which is recognized as the spokesman for Illinois retailing. Within its membership are retailers in all merchandise lines located throughout Illinois. Direct membership includes approximately 10,000 food and non-food retailers ranging in size from small "Mom and Pop" businesses to national chains. Subscribing memberships held by local chambers of commerce, retail committees, and shopping center organizations raise IRMA's membership to over 25,000 Illinois retailers which account for approximately 85% of all retail sales in Illinois.

The Management Association of Illinois (the "Association") provides human resources, training, organizational development and employment law lobbying services to Illinois employers. Established in 1898, the Association is dedicated to delivering innovative business solutions leading to growth and financial stability for its over 1,000 members.

Wisconsin Manufacturers & Commerce ("WMC") is Wisconsin's largest business association, representing approximately 3,600 member firms which employ 500,000 employees throughout the State of Wisconsin. WMC is dedicated to fostering and advancing policies which promote the public interest in business development and a healthy business climate. The Wisconsin Fair Employment Act covers all employers, regardless of size, and thus protects all Wisconsin employees against unlawful discrimination. Thus, WMC believes there is no need to impose the additional burden of federal enforcement on the substantial number of small businesses represented by WMC.